## THE POSITION OF GRANDCHILDREN UNDER THE FAMILY PROTECTION ACT

## IN RE WRIGHT, WILLIS v. DRINKWATER, [1954] N.Z.L.R. 630.

From the sixteenth to the twentieth century English law permitted testators an ever increasing power to control the disposition of their property after death. Restrictions that have been created have related to such matters as perpetuities and remoteness of vesting. The first sign of a trend in the opposite direction was the enactment in New Zealand in 1900 of the Testators' Family Maintenance Act, the provisions of which were subsequently copied in other Commonwealth countries.

Under this statute, now re-enacted as the Family Protection Act 1908, Part II, testators are still free to leave their estates as they choose. Provision is however made for certain of the testator's relatives to apply to the Supreme Court if the will fails to make adequate provision for their proper maintenance and support. On the hearing of an application the Court may in its discretion make such provision out of the estate for the applicants as it thinks fit.

Originally only the testator's wife (or husband) and children could apply under the Act, but subsequent legislation has extended the class of persons who may claim, while s. 22 of the Statutes Amendment Act 1939 now enables a claim to be made against the estate of a person who has died intestate. The first to be added to the list of persons who may claim were illegitimate children who, by s. 26 of the Statutes Amendment Act 1936, may claim if the relationship has been established against, or admitted by, the testator during his lifetime. The parents of the deceased are included by s. 14 of the Statutes Amendment Act 1943 if the testator dies without leaving a spouse or children surviving. The latest addition is made by s. 15 of the Statutes Amendment Act 1947 which brings in grandchildren where the parent, being a child of the testator, has predeceased the testator. This amendment also added adopted children. Subsection 2 of the section provides:

> For the purposes of section thirty-three of the principal Act [sc. the Family Protection Act 1908] . . . the term "children", in relation to any testator or other deceased person, shall be deemed to include:-
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> (a) Adopted children of the deceased person:
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> (b) Children (including adopted children) of any child (including an adopted child) of the deceased person who has died before the deceased person.

The Family Protection Act provides that the question whether or not provision should be made for an applicant, and the amount of any such provision, are matters which are left to the discretion of the Court; but there is a line of cases setting forth the principles by which the Court will be guided in exercising this discretion. In considering claims the Court enquires whether the testator has been guilty of a breach of his moral duty towards the applicants. The testator's moral duty is determined by reference to what a just but not generous testator would have done for the persons claiming, having regard to what is required for their proper maintenance and support.

With the passing of s. 15 of the Statutes Amendment Act 1947 the question arose as to what was the moral duty owed by a testator to his grandchildren who had lost one or both of their parents, and whether this duty differed from the duty the testator owed to those of his children who survived him. The problem can be illustrated by a hypothetical case. At the time of his death a testator's only surviving relatives were a son and a grandson by a deceased daughter. The son and grandson are both eighteen years of age and are both earning their own living. Neither of them has any substantial assets or any other surviving relatives. The testator leaves the whole of his estate to charity, and both the son and grandson make applications under the Family Protection Act. If the Court makes provision for the son out of the estate, what provision, if any, should it make for the grandson?

The first reported cases of applications by grandchildren were two decisions of Gresson J., In re Strawbridge, Telfer v. Strawbridge, [1952] G.L.R. 442 and In re May, Lealand v. The New Zealand Insurance Co. Ltd., [1952] G.L.R. 446.

In the second of these two cases Gresson J. enunciated the principles by which he was apparently guided in both, when he said (at 447):

> Ordinarily there is little or no obligation on a testator or on a testatrix to consider the needs of or to make any provision for grandchildren.

Gresson J. considered that the duty to provide for the grandchildren rested primarily on their surviving parent.

The next reported case was In re Izard, Hunt v. Castle, [1954] N.Z.L.R. 234, a decision of Hay J., who said (at 237):

> This gives rise to the general question as to the standard of moral duty for the purposes of the Act owed by a testator towards a grandchild. In my opinion, it cannot in the nature of the case be deemed to be so high as that owed to a member of a testator's immediate family (and this seems to be the view adopted by Gresson J. in In re Strawbridge (supra) and in In re May (supra)) but it seems impossible to lay down anything but the broadest general principle on the subject, as each case must necessarily depend on its own particular circumstances.

A shift in the attitude of the Courts is found in the judgment of Hutchison J. in In re Wright, Willis v. Drinkwater, [1954] N.Z.L.R. 630, a case which subsequently went before the Court of Appeal. Hutchison J. agreed with Gresson J.'s statement of the principle given in In re May (supra) but said that it was a broad proposition and that he would emphasize the word "little" rather than "no".

Thus at this stage the Courts appear to have considered that the closer relationship meant that the testator's children had a greater claim to provision than the testator's grandchildren, and, in fact, that grandchildren could claim only in exceptional circumstances. Any suggestion that the moral duty that was owing to a child by his mere relationship passed on the child's death to his own children would probably have been rejected.

It may be presumed that had the hypothetical case given above come before the Court the Court would have considered

that because he was more remotely related, the grandson had less claim than the son.

The trend in grandchildren's favour, which first appeared in the judgment of Hutchison J. in In re Wright (supra), was taken a step further by Turner J. in In re Maxwell, Maxwell v. Maxwell, [1954] N.Z.L.R. 720. Regarding Gresson J.'s statement in In re May (supra) he said (at 725):

> . . . it must be remembered that the "ordinary" case to which Gresson J. was referring is the one in which the parent of the grandchildren (and the child of the testator) is still alive and able to assume the responsibility of provision for them.

Following this interesting interpretation of Gresson J.'s statement of the law the case of In re Wright (supra) went before the Court of Appeal. This was the first time the question had been before the Court of Appeal and the judgment of F.B. Adams J. in that Court is the most important statement yet made of the principles by which the Courts will be guided in dealing with claims by grandchildren under the Family Protection Act. The other members of the Court concurred in his judgment, and when the question came before the Court of Appeal again in In re Maxwell (supra) the Court merely stated that it adopted the views expressed in In re Wright.

F.B. Adams J. said (at 638):

> . . . the Court endeavours to give effect to what it deems to have been the moral duty of the testator, resisting always the temptation to alter the testator's dispositions merely because it thinks he might have acted more justly or more generously. . . . The principles laid down . . . are, in my opinion, applicable to claims by grandchildren as well as to all other claims. There is no difference in kind between one sort of claim and another, the words of the Act applying with equal force in all cases. Viewed affirmatively, what the Court is to do, in the case of grandchildren as in the case of other claimants, is to determine whether having regard to all the circumstances of the case, the testator has made adequate provision for their proper maintenance and support. . . .

> In applying these principles to claims by grandchildren, the more remote relationship between them and the testator is one of the circumstances which must be duly taken into account in determining whether the testator has made adequate provision for their proper maintenance and support in view of his means, and their own means, needs and deserts, and the nature and urgency of other claims upon his bounty. I reject accordingly any attempt to differentiate between claims by grandchildren and claims by nearer relatives merely on the ground that as a class they are more remotely related to the testator.

The learned Judge went on to say that he would hesitate to accept the proposition of Gresson J. that there was "ordinarily little or no obligation to consider the needs of or to make provision for grandchildren".

Although this decision of the Court of Appeal is the most authoritative statement of the law on the question it does not tell us clearly whether or not the moral duty owed by a testator towards his grandchildren by a child who predeceased him differs from the moral duty owed to his children. What the learned Judge says is that the more remote relationship between grandchildren and the testator is one of the factors to be taken into account in determining whether the testator has been guilty of a breach of his moral duty towards them, but there must be no differentiation between the claims of grandchildren and the claims of children merely because the grandchildren are more remotely related to the testator.

It is submitted that what is meant by the first part of this statement of the law is not that the more remote relationship is itself a factor to be taken into account, but that the more remote relationship introduces factors which must be taken into account in considering the means, needs and deserts of the claimants.

It is further submitted that the latter part of the learned Judge's statement contains the true principle, that is, that where a testator is survived by children and the issue of deceased children, he owes an equal duty to all in the absence of differences in their means, needs and deserts.

One of the factors which the more remote relationship would introduce would be that in considering the means of a grandchild the Court would have to take into account the financial position of that grandchild's surviving parent (if any) and any financial assistance the grandchild may have received or may expect from some person related to him through the other parent. Thus, if the grandchild claiming provision traces his relationship to the testator through his deceased father, the fact that the grandchild's maternal grandmother is very wealthy or that an elderly maternal uncle is paying for his education or that his mother has remarried and his stepfather is in receipt of a good income, would be matters the Court would take into consideration. Such factors arise out of the fact that the grandchild has relatives who are not in the same relationship to the testator's children.

In examining the deserts of children and grandchildren the Court may have to consider what the claimants have done to assist the testator, and since children are likely to have been more closely associated with the testator and will generally be older they are likely to have done more for him and will in consequence have a greater claim under this head. Thus when the Court comes to consider the means and deserts of children and grandchildren the more remote relationship is likely to introduce factors adverse to the claims of grandchildren which do not apply to children. On the other hand grandchildren may well be young and dependent when all the testator's children have become self-supporting.

The claim that the moral duty owed by a testator to a child is of the same character as the moral duty owed to a grandchild is supported by the fact that the moral duty is to be determined by reference to the generally accepted standards of the community. The frequency with which testators provide that the issue of children who predecease them are to take their parent's share suggests that it is a commonly accepted view that the duty owed to a child is transferred to the grandchildren on the death of that child. The legislature has made a provision similar to this for succession on intestacy. Section 15 of the Statutes Amendment Act 1947, in bringing grandchildren within the provisions of the Family Protection Act, is an expression of this general

attitude. As Turner J. put it in In re Maxwell, [1954] N.Z.L.R. 720 (at 723):

> Such grandchildren, when their parent's place in the family circle of the grandparent becomes vacant, are translated inside the statutory definition of children of the testator.

The learned Judge in this case held that it was unnecessary to enquire into the conduct of the grandchildren's deceased father - conduct which might have disentitled him to the benefit of the Act - since the grandchildren did not claim through him. This part of his decision was affirmed on appeal.

On this view of the law, if our hypothetical case of claims by a son and a grandson whose circumstances were identical were to occur, the proper decision would be for the Court to make the same provision for each.

The proper way for the Court to approach claims under the Act is to consider the means, needs and deserts of the claimants in each particular case, and to enquire whether, in view of all the relevant circumstances, the testator has made adequate provision for the claimants. But it is because the Courts rightly adopt this approach that there exists the danger that the principle of the initial equality of children and grandchildren may be overlooked.

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